86-1276

Supreme Court, U.S.
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No.____

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF WILMINGTON,
*Petitioner*

*v.*

WILMINGTON STEVEDORES, INC.,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

I. By virtue of the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), revitalized by Congress in 1972, maritime employers are insulated from exposure for contribution in personal injury claims involving their longshore and pier employees. Is it logical, fair, or somehow compelled by precedent that, by contrast, state and local government agencies operating ports should now be uniquely exposed to contribution, despite also having paid workers compensation, albeit under a state compensation system which nonetheless has an analogous exclusive remedy provision? Moreover, that such public authorities should now be uniquely exposed to direct negligence claims from employees, which compensation paying maritime employers have never faced since the inception of the LHWCA in 1927?

II. Congress acted in 1972 to eliminate the three-cornered judicial construct of unseaworthiness and indemnity actions which, per the *Sieracki-Ryan* doctrine, would follow a maritime worker's accident. Is it logical and fair to find continuing vitality in *Sieracki-Ryan* nonetheless when the injured maritime worker is employed by a state or local agency?

## PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court of Appeals are named in the caption of the case in this Court.

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The petitioner, the City of Wilmington, Delaware, respectfully prays that a writ of certiorari issue in order to review the judgment of the United States Court of Appeals for the Third Circuit, rendered in this proceeding on September 17, 1986.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Purnell v. Norned Shipping, B.V.*, 801 F.2d 152 (3d Cir. 1986). A further opinion of the Court of Appeals, sur denial of the City's petition for rehearing, is reported at 804 F.2d 248 (3d Cir. 1986).

The memorandum opinions of the District Court for the Eastern District of Pennsylvania, none reported, were issued on January 25, April 25, and June 19, 1985. These and the Third Circuit opinions are set forth in the Appendix.

## JURISDICTION IN THE SUPREME COURT

The judgment of the Court of Appeals was issued on September 17, 1986. A timely petition for rehearing in banc was denied on October 31, 1986. This petition for certiorari has been filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are (former) 33 U.S.C. §§903(a) and 905,[1] and 19 *Delaware Code* §§2304 and 2310. Their full text is appended hereto. (A-40)

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1. The federal statutes underwent slight modification in 1984, per Pub.L. 98-246, but the critical features for purposes of this petition remained unchanged. The former text is set out.

## STATEMENT OF THE CASE

On September 27, 1982, two crane operators employed by the City of Wilmington, Delaware, died in an accident which occurred when the shore-based, City-owned crane they were operating toppled over onto a ship when lifting a load of wire coils from the ship's hold. The City crane, with the operators, had been leased to Wilmington Stevedores, Inc., which stevedoring firm was in charge of unloading the ship. The fatal load, too heavy for the crane's capabilities, had been placed on the crane hook by Wilmington Stevedores' employees.

Survivors of the deceased employees promptly began to receive the appropriate compensation benefits from the City, the decedents' employer, in accordance with the Delaware Workmen's Compensation Law. In addition, Odessa Purnell and Brenda Gist, as representatives, also brought wrongful death actions in the Eastern District of Pennsylvania against the vessel owner, Norned Shipping, B.V., and against Wilmington Stevedores, Inc. Their complaints alleged unseaworthiness and negligence, invoking original admiralty jurisdiction under 28 U.S.C. §1333(1). Each defendant then claimed against the other, and each also brought third-party claims against the City of Wilmington.[2]

In pre-trial proceedings, the City moved for summary judgment, challenging the underlying premise of the action on the basis that *Sieracki-Ryan*[3] was no longer good law since the 1972 Congressional action amending the LHWCA. The District Court recognized that there was a split among the Circuits on the question, but sided with the view that the 1972 amendments to the

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2. All civil actions, four total, were adjudicated on a consolidated basis, and hereinafter will be referred to in the singular.

3. Referring to the three-cornered pattern of actions for unseaworthiness and idemnification under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

LHWCA only vitiated *Sieracki-Ryan* to the extent that a particular maritime employment relationship was within the express coverage of the LHWCA. Because maritime employees of state and municipal port agencies are not "covered" by the LHWCA, per 33 U.S.C. §903(a)(2), the unseaworthiness and indemnification claims went forward.

The following non-jury trial on the liability issues took five days. On the first day the shipowner's counsel conceded an inability to defend against the unseaworthiness claim, and then spent but ten minutes to establish that the ship's crew was uninvolved in the unseaworthiness. The balance of trial concerned the issues of whether and to what extent the liability of Wilmington Stevedores could be passed along to the City on the third-party complaint.

Following argument and post-trial submissions, on April 25, 1985, the District Court ruled that the plaintiffs were entitled to recovery against the shipowner on the unseaworthiness claim, and that the shipowner was entitled to indemnification by Wilmington Stevedores on this liability. The District Court also held that the plaintiffs were entitled to recovery against Wilmington Stevedores on their direct negligence claim. It also concluded, however, that Wilmington Stevedores should not recover on its third-party indemnification and contribution claims against the City of Wilmington. Upon request by Wilmington Stevedores, the trial court also made an alternative apportionment of fault, attributing but a nominal portion, one percent, to the City.

Wilmington Stevedores appealed only the rulings made on its third-party claim. On the appeal, the Third Circuit upheld the denial of indemnity, the issue being one of fact which was controlled by the express warranty and limitation given by the City to Wilmington Stevedores with respect to the load capacity of the crane. However, the Third Circuit did reverse the denial of contribution.

The District Court had denied contribution upon its legal conclusion that the exclusivity provisions of the Delaware Workers' Compensation Law precluded joint tortfeasor status between Wilmington Stevedores and the City, the compensation-paying employer. (A-33-34) Reversing, the Court of Appeals ruled that although the exclusivity bar of the federal statute, the LHWCA, would exempt other maritime employers in a similar situation, the exclusivity provisions of a state compensation statute should not "preempt" a federal maritime claim. (A-10) The Third Circuit did uphold the District Court on the apportionment of fault for contribution, another question turning upon considerations of fact.

## REASONS FOR GRANTING THE WRIT

### I. THE CONTRIBUTION RULING.

#### A. Four Circuits Are In Conflict.

Contribution among joint tortfeasors is an undisputed feature of federal maritime law. However, for contribution to apply there first must be joint tortfeasors, i.e., two parties subject to suit by the injured party. Hence, in a maritime setting, one does not see contribution actions successfully stated against a compensation-paying employer. That is because of the exclusivity provisions in the LHWCA, which preclude direct liability of the employer. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 112-13 (1974).

The Court of Appeals correctly recognized these principles from *Cooper*, but felt "constrained to hold" that contribution would nonetheless be allowed against the City of Wilmington, the compensation-paying employer here, because of considerations of federal supremacy. The compensation payments here were made under a state compensation act, not under the LHWCA, and this proved the difference on whether the employer would be insulated from exposure for negligence.

Other courts of appeals have come to the contrary conclusion on the exact subject. In *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority,* 545 F.2d 235 (1st Cir. 1976), an injured employee of a steamship authority sought to claim under the general maritime law against his employer for a dockside injury after having received worker's compensation from his employer under a state compensation act. That state act had an exclusivity provision which, the First Circuit observed, was "comparable to those found in the federal law". Observing that the federal and state policies thus were in harmony on the question of compensation exclusivity, the First Circuit found "no reason to deny effectiveness to the state provision". *Id.*, at 241.

The Ninth Circuit had come to an equivalent conclusion in *Arvidson v. Dillingham Corporation,* 462 F.2d 1 (9th Cir. 1972), *cert. den.* 409 U.S. 983 (1972). There, too, payment and receipt of benefits under a state compensation plan precluded a contention that the employer also had exposure to the employee for negligence in a maritime setting.

In *Thibodaux v. Atlantic Richfield Company,* 580 F.2d 841 (5th Cir. 1978), *cert. den.* 442 U. S. 909 (1979), the Fifth Circuit came to the opposite conclusion from the First and Ninth Circuits, without making mention of *Murphy* or *Arvidson.* The Fifth Circuit's conclusion in *Thibodaux* is that an exclusive remedy provision in a state compensation statute does not afford insulation for an employer from a later negligence action under the general maritime law for the employee's injury or death. Its stated basis was that state law had to yield to avoid "disharmony". *Id.*, at 847.

It is striking that the Fifth Circuit found "disharmony" just where the First Circuit had found "conformity". Both Circuits had started off from the same point in this Court's decision in *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 373 (1959). There

this Court had warned against "a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce".

It is also striking that when first considering the same question in a prior case, the Third Circuit had been favorably persuaded by the comparable policies of the federal system (under the LHWCA) and a state compensation act. In *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978), the lower court had dismissed a third-party claim which had sought contribution against the injured plaintiff's employer. In affirming, the Third Circuit had noted that the policy of trading off limited damages, liability without fault and the elimination of contribution negligence and assumption of risk defenses were present both in the state system and the LHWCA. Upon that basis, the Third Circuit had concluded that "in this context there appears to be no basis for distinguishing between an employer's federal and state statutory immunity from suit". *Id.*, at 784.

In its opinion denying the City's petition for rehearing, the Third Circuit seemed to overrule *Pastore*, but gave no intimation that its substantive views on the comparability of the state and federal systems have changed. (A-16-17) Rather, evidently the changed result was due solely to the conclusions it now drew on the supremacy issue. Whatever, the result creates a conflict between the Third and Fifth Circuits on the one hand, and the First and Ninth Circuits on the other, over the question of whether a state exclusivity bar may serve as a defense to a negligence claim (and corresponding contribution claim) under the general maritime law.

This question which has split the Circuits is important, as will be elaborated, *infra* at 8. Inasmuch as neither of the conflicting approaches appears to embrace nor seek harmony with the other, only review by this Court can resolve the question.

### B. This Court's Decision In *Moragne* May Have Been Gravely Misconstrued.

The decision upon which the Court of Appeals placed its central reliance was this Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). In *Moragne*, this Court unanimously declared the existence of a wrongful death remedy where, for over 80 years, such a remedy had been lacking. (And where, over the years, the lack of such a remedy was increasingly peculiar and unjust.) However, nowhere in *Moragne* did this Court state that this newly declared wrongful death action was paramount or preemptive. Rather, having rectified the prior anomalous distinction between injury and death claims, this Court stated, "if still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance". *Id.*, at 408.

The direction of this Court in *Moragne* toward resolving subsidiary issues through "persuasive analogy" to federal and state statutes was neither mentioned nor honored by the Third Circuit here. If anything, its decision may have stood *Moragne* on its head, by creating an anomaly, a distinction without a difference, as beween personal injury and death claims. The Third Circuit opinion does not expressly declare this an operative distinction, but its repeated emphasis on the preeminence of "a federal maritime claim for wrongful death," certainly will suggest this distinction to others.[4]

It is difficult to conceive that this Court intended to place the maritime wrongful death remedy upon a higher footing than a general maritime claim for nonfatal injuries. This Court's post-*Moragne* holdings to date

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4. As may the fact that *Thibodaux* also concerned a wrongful death claim. This was repeatedly stressed by the Fifth Circuit, along with invocation of *Moragne*, within its decision in *Thibodaux*.

on subsidiary questions concerning the measure of damages expressly reject such a possibility. *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 281 (1980). However, unless reviewed by this Court, the Third Circuit's decision below, along with the Fifth Circuit's decision in *Thibodaux* will create uncertainty and confusion as to whether, indeed, a maritime death claim is preeminent or whether, instead, on subsidiary questions of applicable defenses, resolution may be found in the large body of case law pertaining to non-fatal accidents.

### C. The Decision Creates A Profound Disadvantage To State And Local Port Authorities Which Maintain A Workforce Of Harbor Workers.

In the case at bar, the immediate financial consequence to the City is undeniably nominal. Indeed, upon the Third Circuit's misconstruction of the Delaware compensation act, the City might be able to cease paying any compensation benefits to its harborworkers.[5] That would be patently unfair, though, and would beg the critical issue created for the City and for all government-operated ports by the Third Circuit ruling.

Under the ruling, any employer besides those under the LHWCA is at peril of double exposure any time its employees cross over or work near territorial waters. However, for public port authorities this peril is not random. Rather, it is particularly acute since, almost by definition, all their employees are in proximity to the area where an injury or death claim would be maritime in nature.

Public port authorities would be unique among compensation-paying employers to face double exposure as a basic rule. *Cf.,* 2A, Larson, *The Law of Workmen's Compensation,* (1983), §§65.10 and 76.20, noting exclusivity as the general rule. Were this exposure shared by

5. The Court of Appeals agrees that "this is an unfortunate, though perhaps plausible, reading of the panel's opinion." (A-17)

other maritime employers, it could be viewed as a curious feature of maritime law. However, the fact is that no maritime employer has faced exposure for negligence and contribution claims involving its own employees since the LHWCA was first passed in 1927.

And the area of disparity between public and private maritime employers would not just be the pier line. Since 1972 the area of LHWCA applicability extends back from the pier line, to the areas where warehousemen work and container stripping operations are performed. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977); *P.C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69 (1979).

State and local port authorities are not for-profit enterprises. They are frequently subsidized in order to maintain or increase local employment, both directly at the docks and with manufacturers and producers in their regions. Nonetheless, if only federal compensation payments under the LHWCA will qualify for an exclusivity bar, while state and local governments are not participants in the LHWCA[6], state and local port authorities may have to cease supplying labor if they are to continue to operate. The docks would be wholly manned and controlled by private employers, while public port authorities would maintain only administrative and clerical staffs.

Finally, it should be noted that this scenario is absolutely not unique to, nor impelled by the terms of the particular Delaware statute.[7] Under the Third Circuit's ruling, no state compensation act, regardless of its level of benefits and regardless of the precise language of its

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6. And have been so excepted since the Act's inception in 1927. G. Gilmore & C. Black, *The Law of Admiralty*, 427 (2d ed. 1975).

7. Which statute, the City believes, was greatly misconstrued by the Third Circuit, albeit as a makeweight. The bootstrap reasoning it employed depended in the first instance upon the correctness of its own just-announced conclusions concerning the strength of a *Moragne* claim. (A-11)

exclusivity provision, would be competent to protect against a further, unlimited exposure to claims for negligence and contribution.

Particularly at a time when commerce and trade are matters of such importance, such an unmistakable impetus toward "privatization" in the ports of this country presents an important question of federalism which should be considered and settled by this Court.

## II. THE INDEMNIFICATION RULING.

Having ultimately prevailed on the indemnification issue, albeit as a matter of fact and not of law, and having prevailed on the contribution issue as well, the City of Wilmington had no basis to appeal to the Third Circuit. Hence, the earlier setback at summary judgment on the question of law pertaining to *Sieracki-Ryan* was not the subject of appeal below. However, in its briefing to the Third Circuit the City invited consideration of the question of whether *Sieracki-Ryan,* undeniably a target of Congressional action in 1972, nonetheless survived as good law for those pockets of maritime employment excepted from the LHWCA.

The Third Circuit did not take up that invitation, but declared its outlook thus:

> The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act overruled *Ryan* as it applies to covered employees. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 40 (3d Cir. 1975).[8] But the 1972 amendments do not limit *Ryan*'s applicability to employees, like plaintiffs' decedents, who were not covered by that Act.

Slip op. at 6, fn.1. (A-6)

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8. Full citation to *Griffith* would include *cert. den.*, 423 U.S. 1054 (1976).

In *Griffith*, the Third Circuit had expressed criticism of the top-heavy jurisprudence which had developed under *Sieracki-Ryan*. There it had said, "One would like to assume that the ghost of *Sieracki-Ryan* had been exorcised completely by the addition of §905(b)." Although it offers no discussion of its changed conclusion, here, as on the closely-related contribution question, the Third Circuit seems to have been constrained by mistaken notions of what federal supremacy requires.

**A. Three Circuits Are In Conflict.**

This is a significant question which has divided two other circuits. The Ninth Circuit has reasoned that the 1972 amendments vitiated *Sieracki-Ryan*, not only as to accidents befalling longshoremen who were literally "covered" under the LHWCA, but as to all longshoremen. In *Normile v. Maritime Company of the Philippines*, 643 F.2d 1380 (9th Cir. 1981), that court declared that through the amendments, "all that the Supreme Court gave, Congress took away. There remains no viable precedent to which plaintiff public employee can analogize". *Id.*, at 1382. The Ninth Circuit felt its interpretation harmonized with the plain intent of Congress, the tenor of whose legislative report "evidenced a desire for uniformity in the treatment of all longshoremen."

Four days before the Ninth Circuit issued *Normile*, the Fifth Circuit had reached a contrary conclusion. In *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981) the plaintiffs were harbor workers employed by the Panama Canal Company, an agency of the United States. Federal employees, like state and local employees, are likewise not "covered" under the LHWCA. 33 U.S.C. §903. The Fifth Circuit concluded that the precise measure of LHWCA coverage defined the reach of Congressional repeal of *Sieracki-Ryan*, and thus allowed the unseaworthiness and indemnity claims to go forward.

This is not the place to argue for the correctness of the Ninth Circuit approach over that of the Third and Fifth Circuits. What the conflict does reflect, though, are conflicting perceptions between the way in which lower federal courts are to interpret the interplay between this Court and Congress in the development of admiralty law.

This Court has on more than one occasion discussed the impetus leading toward the 1972 amendments to the LHWCA. This Court has noted the plain fact that Congress intended to immunize stevedores and eliminate pointless litigation expense. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980). This Court, as the author of *Sieracki-Ryan*, is the only logical source to declare, definitively, whether the 1972 amendments, adopted upon that impetus, wholly vitiated *Sieracki-Ryan* for all post-1972 maritime accidents. Otherwise, continuing speculation, much of it wrong if the Third Circuit is right, will lead to increasingly mixed results.[9]

### B. The Possibility Of Continuing Vitality For Sieracki-Ryan Is A Critical Issue For All State And Local Port Authorities And For All Shippers Who Deal With Them.

As was true of the contribution issue, a unique exposure to implied indemnity claims, not shared by other maritime employers, gives a profound push toward privatization of the waterfront. The unique and unwarranted disincentive against maintaining a blue collar public workforce on the docks is of a kind with the disincentive created by the erroneous ruling on contribution. *Infra*, at I., C., p. 8. However, the force of that

9. And speculation among commentators. Writing after passage of the 1972 amendments, the leading admiralty commentators presumed that the Congressional draftsmen "meant to abolish the entire class of *Sieracki*-seamen," even as to those harbor workers not technically "covered". Gilmore & Black, *supra*, at 449.

disincentive is increased here because others will become entangled in the net.

If *Sieracki-Ryan* remain good law when an accident involves longshoremen who are not "covered" under the LHWCA, then vessel owners would be foolish to continue to encounter situations wherein their vessels might be exposed to "uncovered" longshoremen. For with the possibility of injury to a longshoreman not covered by the LHWCA, the vessel owner courts a situation in which it is brought into an injury or wrongful death claim on a theory of "unseaworthiness."

At best, the vessel owner in such situations will be able to pass along all of his unseaworthiness exposure by means of an indemnity action. That is what happened here, but at a significant cost. The shipowner was held through two years of litigation and a five day trial to present ten minutes of testimony in order to pass along technical liability.

It was precisely this sort of unnecessary litigation expense which led to the pressure on Congress to eliminate unseaworthiness actions for dock workers. Presumably that purpose was achieved by the 1972 amendments. If it is now found that nonetheless there are backwaters of exposure in those ports where longshoremen and harbor workers are employed by public authorities, the remedy for shippers and vessel owners will be to avoid those ports where this unseaworthiness exposure exists. In turn, this pressure on public ports would give further impetus to the public authorities to withdraw from supplying labor at their facilities.

An issue of this much public impact, arising wholly from a construction ofr this Court's precedents, can only be resolved by this Court.

## CONCLUSION

For the several reasons presented above, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 85-1507, 85-1508,
85-1509, and 85-1510

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PURNELL, ODESSA, As the Administratrix
of the Estate of WISE, LARRY McKINLEY,
Deceased

vs.

NORNED SHIPPING B.V. and
CHESAPEAKE TRADING CORPORATION

vs.

WILMINGTON STEVEDORES

and

CITY OF WILMINGTON

(Third Party Defendants)

Wilmington Stevedores, Inc.,

Appellant in
No. 85-1507

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PURNELL, ODESSA, As the Administratrix
of the Estate of WISE, LARRY McKINLEY,
Deceased

vs.

WILMINGTON STEVEDORES, INC.
CHESAPEAKE TRADING CORPORATION

vs.

CITY OF WILMINGTON

and

NORNED SHIPPING B.V.

(Third-Party Defendants)

Wilmington Stevedores. Inc.,

Appellant in
No. 85-1508

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GIST. BRENDA. As the Administratrix
of the Estate of William Martin Gist.
Deceased

vs.

NORNED SHIPPING B.V.

vs.

WILMINGTON STEVEDORES

and

CITY OF WILMINGTON

Wilmington Stevedores. Inc.

Appellant in
No. 85-1509

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GIST BRENDA. As the Administratrix
of the Estate of GIST. WILLIAM MARTIN.
Deceased

vs.

WILMINGTON STEVEDORES. INC.

vs.

CITY OF WILMINGTON

and

NORNED SHIPPING B.V.

and

CHESAPEAKE TRADING CORPORATION

Wilmington Stevedores, Inc.

Appellant in
No. 85-1510

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On Appeal from the United States
District Court For the
Eastern District of Pennsylvania
(Civil Action Nos. 82-5298, 83-1118,
83-0605, and 83-3084)

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Argued May 1, 1986

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BEFORE: SLOVITER and STAPLETON,
*Circuit Judges* and MENCER,
*District Judge**

(Filed September 17, 1986 )

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* Honorable Glenn E. Mencer, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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**OPINION OF THE COURT**

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STAPLETON, *Circuit Judge*:

I.

On September 27, 1982, two crane operators employed by appellee, the City of Wilmington (the City), died in an accident at the Port of Wilmington. The crane was in the process of discharging a load of steel coils from the foreign vessel M/V NORNED THOR when the crane toppled into the ship's cargo hold, killing the operators and causing substantial damage to both the ship's cargo and the crane. At the time of the accident, the crane was owned by the City, operated by City employees, and leased by the City to appellant, Wilmington Stevedores, Inc. (the Stevedore), a company in the business of providing stevedoring services at the Port of Wilmington.

Representatives of the deceased crane operators brought wrongful death actions against the vessel's owner Norned Shipping, B.V., and the Stevedore. Cross-claims were filed between the defendants and third-party claims were filed by defendants against the City and the charterer of the NORNED THOR, the Chesapeake Trading Corporation.

The district court bifurcated the liability and damage issues. In its April 25, 1985 Memorandum Opinion on liability, the district court concluded that the NORNED THOR's unseaworthiness was "a substantial factor" in causing the accident and that the unseaworthiness was not caused by Norned Shipping, B.V. or Chesapeake Trading Corporation. Memorandum Opinion at 13. Rather, the district court found that the unseaworthiness of the NORNED THOR was caused by the negligence of the Stevedore:

> (a) in failing to properly supervise its longshoremen working aboard the vessel to assure that they properly monitored the discharge operation; (b) in exceeding the weigh capacity of the crane as set by OSHA Regulations; (c) in increasing the weight of the lift beyond the limit imposed by the City of Wilmington; and (d) in failing to warn the operators of the crane that the load had been increased.

Memorandum Opinion at 7.

Accordingly, the district court held that the plaintiffs were entitled to recover against Norned Shipping, B.V. and the Stevedore and that Norned Shipping, B.V. was entitled to be indemnified by the Stevedore. In addition, the district court held that the Stevedore was "not entitled to indemnity from the City of Wilmington . . . because there was no express or implied warranty by the City that the crane was fit for the purpose of lifting a draft in excess of 12 coils." Memorandum Opinion at 14. Finally, the district court held that the Stevedore was not entitled to contribution from the City because Delaware's Workmen's Compensation Act foreclosed the imposition on the City of liability for the deaths of plaintiffs' decedents.

In its June 19, 1985 Memorandum Opinion denying the Stevedore's request for reconsideration, the district court assigned 99 percent of the fault for the accident to the Stevedore and one percent to the City for "failing to protect plaintiffs from negligence of the Stevedore in violating the express restrictions on the . . . crane." Memorandum Opinion at 4 n.2.

In its appeal from the final judgment entered on these rulings, the Stevedore asserts that the district court erred in denying it indemnity and contribution from the City as well as in apportioning fault. We will affirm on the indemnity and apportionment of fault issues and reverse on the contribution issue.

II.

The district court found that federal maritime law recognizes indemnity based upon an implied warranty of workmanlike service. *Ryan Stevedoring Co. v. Atlantic Steamship Corp.*, 350 U.S. 124 (1956).[1] The district court concluded, however, that the City was not liable to the Stevedore for indemnity on the basis of an implied warranty because the City had expressly limited any load capacity warranties. In particular, the district court found as a matter of fact that the City had authorized the Stevedore to use the crane to lift a maximum of twelve steel coils and that the accident had been caused by loading 15 1/2 coils. These findings of fact are not clearly erroneous. *See Humble Oil v. Philadelphia Ship*, 444 F.2d 727, 731-732 (3d Cir. 1971). We, therefore, affirm the district court's indemnity holding.

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1. The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act overruled *Ryan* as it applies to covered employees. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 40 (3d Cir. 1975). But the 1972 amendments do not limit *Ryan*'s applicability to employees, like plaintiffs' decedents, who are not covered by that Act.

III.

The parties agree that the federal maritime law provides for contribution among joint tortfeasors. *See e.g., Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., et al.*, 475 U.S. 106 (1974). The City correctly points out, however, that there is an exception to this rule where one tortfeasor is immune from liability to the injured party. In such a situation, the immune tortfeasor cannot be made to pay for the plaintiffs' injuries indirectly through contribution. Thus, where one tortfeasor is the employer of the injured party and the injured party receives benefits under the Longshoremen's And Harbor Workers' Compensation Act ("LHWCA"), no contribution can be awarded against the employer because the LHWCA makes its statutory remedy exclusive as between the employee and his employer. *Id.* at 111-113.[2] On the other hand, when the injured party is entitled to sue both tortfeasors for his injuries, there is no reason to deny contribution between the joint tortfeasors. As the Supreme Court explained in the *Cooper Stevedoring* case in the context of a contribution claim by the owner of a vessel against a negligent stevedore who did not employ the injured longshoreman:

> Sessions [who was injured while unloading the vessel] was not an employee of Cooper [the stevedore which had loaded it in another port] and could have proceeded against either the Vessel or Cooper or both of them to recover full damages for his injury. Had Sessions done so, either or both of the defendants could have been held responsible

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2. The LHWCA, 33 U.S.C. §§ 901-933 does not bar contribution in this case because the LHWCA expressly exempts from its coverage employees of political subdivisions of states, such as municipalities. 33 U.S.C. § 903. Therefore, exclusive remedy provisions of the LHWCA, 33 U.S.C. § 905, do not apply here.

> for all or part of the damages. Since Sessions could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right. On the facts of this case, then, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors.

*Cooper*, 417 U.S. at 113.

The City asserts that this case falls within the exception to the general rule of contribution because it made payments to the plaintiffs under Delaware's Workmen's Compensation Act, 19 Del. C. § 2301 et seq. Accordingly, the City argues that the plaintiffs were barred from bringing suit against the City under Section 2304 of that Act which makes the workmen's compensation remedy exclusive as between the injured employee and his employer. 19 Del. C. § 2304.[3] The district court denied contribution on this theory. We conclude that it erred in doing so.

In *Moragne v. States Marines Lines*, 398 U.S. 375 (1970), the estate of a longshoreman killed while working aboard a vessel in navigable waters within the State of Florida brought a wrongful death action against the owner of the vessel. The Supreme Court held that federal maritime law affords a federal remedy for wrongful deaths occasioned in state territorial waters.

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3. Section 2304 provides:

> Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

The City argues that *Moragne* is inapposite here because the defendant in that case was the vessel owner and not the former employer of the plaintiff's decedent. We find nothing in *Moragne* that would make this distinction material, however. *Moragne* overruled *The Harrisburg*, 119 U.S. 199 (1886), which had imported into American admiralty law the old English common law rule that no civil action will lie for an injury which results in death. In overturning this outmoded view, the *Moragne* Court characterized its action as "merely remov[ing] a bar to access to the existing general maritime law." 398 U.S. at 405-6. The City has identified nothing in the general maritime law that would limit wrongful death claims to shipowners. The inquiry in such cases is the "violation of maritime duties," 398 U.S. at 409, not the defendant's relationship to the vessel.

This view is supported by the Fifth Circuit's decision in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978). The plaintiffs' decedent in *Thibodaux* was an oil field construction worker who drowned in a canal while being transported to work at ARCO's oil field in a vessel owned by a third party. The plaintiffs filed suit against ARCO under the general maritime law and the LHWCA, alleging that ARCO negligently caused the death of the deceased. ARCO, who had contracted out oil field construction and maintenance work to the decedent's direct employer, was deemed his "statutory employer" under Louisiana law. The Court held that, while the decedent was not covered by the LHWCA because his work was performed solely on land, he had a wrongful death claim against ARCO based upon the general maritime law as interpreted in *Moragne*. The *Thibodaux* Court concluded:

> The plaintiffs are permitted to go forward with their lawsuit not merely because the deceased was

> killed upon navigable waters, but because the facts surrounding the occurrence display a sufficient relationship to traditional maritime activity, and because the Supreme Court in Moragne saw fit to provide a federal maritime remedy for wrongful death occurring upon state territorial waters regardless of the rights which might be afforded to the plaintiff under state law.

580 F.2d at 847.

The *Thibodaux* Court thus applied *Moragne* in the context of a case in which the plaintiffs' decedent had a less direct link to maritime activity than did plaintiffs' decedents here and in which the defendant was the decedent's employer and not the owner of the vessel. Similarly applying *Moragne*, we hold that the plaintiffs in this case had a federal maritime claim for wrongful death against the City.

Having recognized the existence of such a federal claim, we are constrained to hold that, under the supremacy clause, that claim cannot be preempted or impaired by state law. The *Thibodaux* Court reached the same conclusion in the course of rejecting ARCO's affirmative defense based on the exclusivity provisions of Louisiana's Workmen's Compensation Act. The Court there concluded that the "exclusive remedy provision in a state Workmen's Compensation Law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law." *Thibodaux*, 580 F.2d at 847. This conclusion was based in part on *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). The Supreme Court there noted that while "states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantive admiralty rights as defined in controlling acts of Congress or by interpretive decision of this Court."

Moreover, we believe that Delaware, in its workmen's compensation statute, has recognized the preemption principles articulated in *Thibodaux*. Delaware's Act expressly stipulates that its provisions do not apply to workers "injured or killed while engaged in interstate or foreign commerce, or to their employers, whenever the laws of the United States provide for compensation or for liability for such injury or death." 19 Del. C. § 2310. While the LHWCA does not provide for such "compensation," the federal maritime common law, under *Moragne*, does impose "liability for such injury or death." Accordingly, Delaware's statute, by its own terms, is not applicable in the circumstances currently before this court.

Finally, the City argues that because the plaintiffs elected to accept the payments which the City tendered under Delaware's Workmen's Compensation Act, they cannot now sue the City, and that the City, accordingly, should not be exposed to liability for contribution. The record does not disclose anything concerning the City's reasons for tendering those payments or the plaintiffs' reason for accepting them and we decline to express an opinion on whether the plaintiffs could now bring a wrongful death action against the City. However, if the plaintiffs had a wrongful death claim against the City immediately following the decedents' deaths, as we hold they did, the Stevedore, at that point, had an *inchoate* claim for contribution against the City under the federal maritime law which would mature when it paid more than its share of the joint liability. The City has suggested no legal theory which would support the conclusion that the voluntary actions of the City and the plaintiff somehow operated to eliminate the Stevedore's contribution claim without its consent. We know of no such theory and decline to accept the City's argument.

On remand, the district court will enter judgment in the Stevedore's favor on its contribution claim against the City.

IV.

The district court anticipated the possibility of a reversal of its ruling on contribution when it apportioned fault between the Stevedore and the City 99 percent to one percent. We commend the district court for this approach since it permitted us to review both issues in this one appeal.

The district court concluded that the City's crane "was not inherently defective but was rendered defective by the Stevedore in loading it beyond the capacity set by the City." In the district judge's view, this tragic accident was caused by the deliberate and knowing actions of the Stevedore in loading the crane beyond the level it had been told was the limit for safe operations. The only negligence found on the part of the City was its failure to anticipate such extreme conduct by providing an overload device which would have advised decedents of the Stevedore's overloading. Under these circumstances, we cannot say that the district court's apportionment of fault was clearly erroneous. Accordingly, we must uphold that apportionment. *Canal Barge Co., Inc. v. China Ocean Shipping co.*, 770 F.2d 1357, 1362 (5th Cir. 1985); *Harbor Tug & Barge, Inc. v. Belcher Towing Co.*, 733 F.2d 823, 825 (11th Cir. 1984); *Getty Oil Co. (Eastern Operations), Inc. v. SS Ponce De Leon*, 555 F.2d 328, 334 n.6 (2d Cir. 1977).

V.

For the foregoing reasons, we will reverse and remand to the district court for further proceedings consistent with the opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 85-1507, 85-1508,
85-1509, and 85-1510

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PURNELL, ODESSA, As the Administratrix of the Estate of WISE, LARRY McKINLEY, Deceased

vs.

NORNED SHIPPING B.V. and
CHESAPEAKE TRADING CORPORATION

vs.

WILMINGTON STEVEDORES
and
CITY OF WILMINGTON
(Third Party Defendants)
Wilmington Stevedores, Inc.,
Appellant in
No. 85-1507

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PURNELL, ODESSA, As the Administratrix of the Estate of WISE, LARRY McKINLEY, Deceased

vs.

WILMINGTON STEVEDORES, INC.
CHESAPEAKE TRADING CORPORATION

vs.

CITY OF WILMINGTON
and
NORNED SHIPPING B.V.

(Third-Party Defendants)
Wilmington Stevedores, Inc.,
Appellant in
No. 85-1508

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GIST, BRENDA, As the Administratrix of the Estate of William Martin Gist, Deceased

vs.

NORNED SHIPPING B.V.

vs.

WILMINGTON STEVEDORES
and
CITY OF WILMINGTON
Wilmington Stevedores, Inc.
Appellant in
No. 85-1509

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GIST, BRENDA, As the Administratrix of the Estate of GIST, WILLIAM MARTIN, Deceased

vs.

WILMINGTON STEVEDORES, INC.

vs.

CITY OF WILMINGTON
and
NORNED SHIPPING B.V.
and
CHESAPEAKE TRADING CORPORATION
Wilmington Stevedores, Inc.
Appellant in
No. 85-1510

BEFORE: SLOVITER and STAPLETON,
*Circuit Judges*
and MENCER, *District Judge**

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**OPINION SUR DENIAL OF PETITION OF APPELLEE CITY OF WILMINGTON FOR PANEL REHEARING**

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The City of Wilmington has moved for panel rehearing asserting that the panel's decision in this case creates a conflict with our decision in *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978). In *Pastore*, a fireman employed by the City of Philadelphia recovered damages from the owner of a vessel for injuries which he sustained while attempting to extinguish a fire on the vessel. The shipowner sought contribution from the City. The court denied this contribution claim noting that Pennsylvania's Workmen's Compensation Act barred the fireman from suing the City and holding that the City could not be held indirectly liable for the plaintiff's injuries through the granting of a claim for contribution. While the contribution claim was denied in *Pastore* and was allowed here, the legal analysis in *Pastore* is entirely consistent with that of the panel in this case. Both cases hold that the availability of contribution from a joint tortfeasor in a maritime case depends on whether the injured party could have recovered damages for his injuries from the party from whom contribution is sought. The difference in the result arises from the fact that the shipowner in *Pastore* did not assert that the

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* Honorable Glenn E. Mencer, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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exclusivity provision of the Pennsylvania statute would violate the supremacy clause if applied to bar a right conferred by federal maritime law. Since no such contention was made and the exclusivity provision of the Pennsylvania statute was applicable on its face, the *Pastore* court understandably concluded that the fireman was barred from suing the City.

The petition for panel reargument fails to suggest any rationale by which we could conclude that a state statute can extinguish a federally created cause of action. Based upon the authorities and analysis set forth in the panel opinion, we remain convinced that no such theory exists. Certainly, no such theory was embraced by this court in *Pastore*.

The petition for panel rehearing also suggests that the panel's decision denies the benefits of state workmen's compensation programs to harborworkers employed by state and local governments. This is an unfortunate, though perhaps plausible, reading of the panel's opinion. We did not mean to suggest that a state may not confer the benefits of its workmen's compensation program on harbor workers by whomever employed. Indeed, the Supreme Court has held that states may confer workmen's compensation benefits on harborworkers even though Congress has conferred similar federal benefits on most such workers. *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715 (1980).* The panel's opinion holds only that Delaware, by virtue of 19 Del. C. § 2310, has *elected* not to confer its workmen's compensation benefits on workers

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* We note that the existence of this option to *supplement* federal rights does not, of course, imply a corresponding right to diminish or eliminate federal rights. The Supreme Court makes clear in *Sun Ship* that a state workmen's compensation statute may not require a worker to forego his compensation benefits under the Longshoremen's and Harborworker's Compensation Act. *See* 447 U.S. at 724, n.6 and accompanying text.

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"injured or killed while engaged in interstate or foreign commerce ... whenever the laws of the United States provide for compensation or for liability for such injury or death."

The petition for panel rehearing filed by the City of Wilmington, appellee, in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the City's petition for panel rehearing will be denied.

By the Court,

/s/ WALTER K. STAPLETON

Circuit Judge

Dated: October 31, 1986

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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ODESSA PURNELL, as the Administratrix of the Estate of LARRY McKINLEY WISE, Deceased — CIVIL ACTION

*vs.*

NORNED SHIPPING, B.V.

*vs.*

WILMINGTON STEVEDORES, INC. and CITY OF WILMINGTON — NO. 82-5298

---

ODESSA PURNELL, as the Administratrix of the Estate of LARRY McKINLEY WISE, Deceased — CIVIL ACTION

*vs.*

WILMINGTON STEVEDORES, INC.

*vs.*

NORNED SHIPPING, B.V. and CITY OF WILMINGTON — NO. 83-1118

---

BRENDA GIST, as the Administratrix of the Estate of WILLIAM MARTIN GIST, Deceased — CIVIL ACTION

*vs.*

NORNED SHIPPING, B.V.

*vs.*

WILMINGTON STEVEDORES, INC. and CITY OF WILMINGTON — NO. 83-605

---

BRENDA GIST, as the Administratrix of the Estate of WILLIAM MARTIN GIST, Deceased — CIVIL ACTION

*vs.*

WILMINGTON STEVEDORES, INC. — NO. 83-3084

NORSTEEL CORPORATION — CIVIL ACTION

*vs.*

MV NORNED THORD, et al.

*In Rem*

and

NORNED SHIPPING B.V.

*In Personam*

and

CHESAPEAKE TRADING CORP.

*In Personam*

and

THE CHESAPEAKE CORPORATION OF VIRGINIA

*In Personam*

and

CITY OF WILMINGTON

*In Personam*

and

WILMINGTON STEVEDORES, INC.

*In Personam* — NO. 83-4693

## ORDER

Presently before the court is defendant City of Wilmington's motion for partial summary judgment and defendants Wilmington Stevedores and Norned Shipping's opposition thereto. The City of Wilmington advances several arguments in support of its motion. First, the City argues that as the employer of plaintiffs' decedents, its payments under the Delaware Worker's Compensation Act, 19 *Del. C.* § 2330 relieves the City of any liability by way of indemnification and contribution to third parties who are found to be liable to a representative of a deceased employee. However, as a matter of law, I cannot conclude that the Delaware statute can relieve the City from possible liability in this context.

The City relies on the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation

Act (LHWCA) to support its contention that no third-party liability can be assessed against it. However, the LHWCA frees from liability by its express terms only those covered by its provisions, 33 U.S.C. § 903(a)(2). It is undisputed that the City is not an employer included under the provisions of the LHWCA. The City's argument that causes of action consistent with *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corporation*, 350 U.S. 124 (1956), are no longer viable because of the amendments to the LHWCA is in my view without merit. *See Aparico v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981).[1]

The City's remaining arguments are based on the premise that the record does not raise an inference of factual support which would allow any award against the City. In order to grant a motion for summary judgment, a court must find that there exists no genuine issue as to any material fact. *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464 (1962); *Ettinger v. Johnson*, 556 F.2d 692 (3d Cir. 1977). However, the record here reveals factual inconsistencies which make the granting of summary judgment inappropriate. Therefore, this 25th day of January, 1985, IT IS ORDERED that defendant's motion for summary judgment is DENIED.

By the Court:

CLIFFORD SCOTT GREEN, J.

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1. I note that there is a split among the circuits as to the resolution of this issue. *See Normile v. Maritime Company of the Phillipines*, 613 F.2d 1380 (9th Cir. 1981). However, I am persuaded by the reasoning of Judge Rubin's opinion in *Aparico*. Moreover, a plain reading of the LHWCA cuts against the argument of the City.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

ODESSA PURNELL, as the Administratrix of the Estate of LARRY McKINLEY WISE, Deceased — CIVIL ACTION

*vs.*

NORNED SHIPPING, B.V.

*vs.*

WILMINGTON STEVEDORES, INC. and CITY OF WILMINGTON — NO. 82-5298

---

**MEMORANDUM**

GREEN, J. — APRIL 25, 1985

These civil actions are brought by the personal representatives of former City of Wilmington employees, utility crane operators, who were fatally injured in a mishap on September 27, 1982 while discharging cargo from a vessel. The ship, its owner, its charterer, the stevedore and the lessor of the crane are used as defendants or joined as third party defendants alleged to be at fault in causing the accident. After bifurcated, nonjury trial, limited to the issue of fault, I make these findings of fact, established by a preponderance of the evidence, and conclusions of law as required by Fed. R. Civ. P. 52(a).

**FINDINGS OF FACT**

1. On September 27, 1982, and at all times pertinent to these cases, Larry McKinley Wise and William Gist were employed by the City of Wilmington as utility crane operators at pier facilities owned and maintained by the City of Wilmington at Wilmington, Delaware.

2. On September 27, 1982, and at all times relevant, Wilmington Stevedores, Inc. was a stevedoring company

with its principal place of business located in Wilmington, Delaware.

3. At the time of the accident hereinafter described, Wilmington Stevedores, Inc., pursuant to contract with ship officials, was engaged in discharging coils of wire rod from the vessel M/V Norned Thor using a land based crane C-2 leased from the City of Wilmington. The City of Wilmington required that its land based cranes be used in the unloading operation of vessels which did not have their own cranes. Wise and Gist were duly assigned to operate crane C-2.

4. At all times material, the M/V Norned Thor was owned by Norned Shipping, B.V. and was under time charter to Chesapeake Trading Corporation.

5. The vessel did not contain any defects and/or unsafe conditions on September 27, 1982 when it was turned over to Wilmington Stevedores, Inc. No member of the crew of the M/V Norned Thor participated in the discharge operations or in the operation of crane C-2.

6. James Murphy, president of Wilmington Stevedores, Inc., applied to Robert Senseny, harbor master of the City of Wilmington, for a berth to unload the vessel. He was assigned berth 5 and crane C-2.

7. Murphy was told that crane C-2 had been used to discharge a similar wire rod cargo at the rate of 200 tons an hour; also, he was told that the crane was limited to a pickup of 12 coils per lift. Senseny also told Murphy that the crane was a "good fast crane as long as you handle a small load".

8. On August 9, 1982, after certain repairs to the crane were completed, the International Cargo Gear Bureau, Inc. issued its certificate of use for the crane noting thereon that the electronic load indicating device was not in service. This device when operating warns the operator of an overload of the crane by flashing lights and sound. The certificate was posted in the cab of the crane and copies were available in the port engineer's office.

9. Mr. Murphy knew of the availability of the certificate and the OSHA requirement that the certificate be inspected by the employer before using the crane; nevertheless, he failed to inspect it.

10. On September 27, 1982, the inoperative electronic load indicating device did not warn the operators of the crane overload nor did the device give any data which would in any way aid or mislead the operator.

11. Within the cab and in view of the operator was a load capacity chart, which showed the manufacturer's standard for safe maximum working loads at different reaches of the boom.

12. At a reach of 40 feet, the chart showed a safe working load for the crane of 25,000 pounds or approximately 12 tons. At 60 feet, the chart showed a safe working load of 13,500 pounds.

13. Mr. Murphy was told that the crane could not be used to pick up more than 12 coils per draft. (The average weight of a coil was approximately 2,480 pounds.) Mr. Murphy passed this restriction on to his ship superintendent who in turn passed the information on to the gang foreman.

14. The first seven lifts were made without incident. These lifts were limited to a first lift of 6 coils, four lifts of 12 coils and two lifts of 10 coils.

15. On the eighth lift the fatal accident occurred. The longshoremen working in the hold of the vessel strung together a row of eight coils and a row of seven and a half coils. This constituted a lift of approximately 38,440 pounds or slightly in excess of 19 tons.

16. One longshoreman, who participated in stringing the coils, did so pursuant to what he believed to be an instruction from a superior on the deck of the vessel. The evidence is conflicting on this point and insufficient to permit a finding that the superior gave such an instruction.

17. The on deck personnel of Wilmington Stevedores were inattentive and not aware of the overload;

therefore, no warning as to increased weight of the lift was given to the crane operators, who during the course of the discharge of the vessel relied on instructions to lift signalled by the deck employees of the stevedore.

18. The weight of the load (slightly more than 19 tons) caused the crane to tip and fall over into the hold of the ship; an explosion and fire ensued and the lives of the operators were lost.

19. Wilmington Stevedores, Inc. was not the employer of Wise and Gist; however, as the employer of other longshoremen involved in the discharge of the vessel, it was bound by the following OSHA Regulations. 29 C.F.R. § 1918.13(a)(3) requires that an employer not use shore to vessel cargo handling cranes until he has ascertained that the device has been certified as evidenced by current and valid documents of testing for compliance. 29 C.F.R. § 1918.74(a)(9) requires that every crane to load or discharge cargo into or out of the vessel shall be fitted with a load indicating device or alternate device in proper working condition. An exception permits operation without such a device while the crane is used exclusively to handle cargo, the total actual gross weight of which is known by means of marking of the unit or units hoisted, and only when such total actual gross weight does not exceed 11,200 pounds or the rated capacity of the crane, whichever is less.

20. C-2 crane had been duly certified. In order to comply with OSHA standards governing cranes without a load indicating device, the OSHA lift limit for the C-2 crane was 11,200 pounds of marked units.

21. The City of Wilmington, as a municipality, is not an employer bound by OSHA Regulations. However, the City of Wilmington acknowledges that "it takes its cranes through the certification process because they are to be used by stevedores, like Wilmington Stevedores, who themselves are obligated to use certificated equipment."

22. Wilmington Stevedores, Inc. was negligent: (a) in failing to properly supervise its longshoremen working aboard the vessel to assure that they properly monitored the discharge operation; (b) in exceeding the weight capacity of the crane as set by OSHA Regulations; (c) in increasing the weight of the lift beyond the limit imposed by the City of Wilmington; and (d) in failing to warn the operators of the crane that the load had been increased.

23. The negligence of Wilmington Stevedores, Inc. was a substantial factor in causing the accident.

24. The overloading of the crane with 15½ coils rendered the vessel unseaworthy and the unseaworthiness of the vessel was a substantial factor in causing the accident.

25. The C-2 crane leased by the City of Wilmington to Wilmington Stevedores, Inc. was not inherently defective but was rendered defective by the stevedore in loading it beyond the capacity set by the City. Had the crane been equipped with an overload warning device, the operators would have been alerted to the fact that the stevedore had negligently exceeded the load limit of the crane. The absence of said device was a substantial factor in causing the accident.

26. The crane had a capacity to lift at least 14 coils without becoming dynamically unstable and tipping. Thus, limited to a twelve coil lift, the City of Wilmington was not negligent in authorizing the stevedore to use the crane to lift a maximum of twelve coils. However, the City breached a duty owed to its employees and the ship by not equipping the crane with a loan indicating device to protect against the stevedore's foreseeable negligent conduct of using the crane to lift in excess of its capacity.

27. Mr. Wise and Mr. Gist were not negligent. Neither Mr. Wise nor Mr. Gist assumed the risk of harm.

## DISCUSSION

Plaintiffs have not asserted any claims against the City, apparently recognizing the exclusivity of the Delaware Workmen's Compensation Law 19 DEL CODE ANN. §2304 (1977).[1] Plaintiffs have, however, asserted claims against the ship, its owner, and its charterer, on the theory of unseaworthiness. There is no serious dispute about the plaintiffs' right to recover on an unseaworthiness theory. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). A ship owner is liable on an unseaworthiness theory for an accident caused by the stevedore, if the unseaworthy condition was a substantial factor in causing the accident. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Jones v. Dean Norske Amerikalinje A/S*, 451 F.2d 985 (3d Cir. 1971). The evidence clearly establishes that through no fault of the ship, its owner, or its charterer, the negligence of the stevedore in overloading the crane was a substantial factor in bringing about the accident and thereby the unseaworthiness of the vessel. Thus, the plaintiffs are entitled to recover against the ship, its owner, and its charterer for unseaworthiness. *Sieracki, supra.*

Also, plaintiffs have asserted a claim against Wilmington Stevedores. The negligence of Wilmington Stevedores, as stated in the findings of fact Nos. 22 and 23, is convincingly established by a preponderance of the evidence as being a substantial factor in causing the ship to be unseaworthy. Thus, plaintiffs are entitled to recover against the stevedores on their negligence claims.

---

1. The workmen's compensation law provides in pertinent part:

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment regardless of the question of negligence and to the exclusion of all other rights and remedies.

The vessel owner and its charterer seek indemnification from both the City of Wilmington and Wilmington Stevedores based on a breach of an implied warranty of workmanlike services. This implied warranty was recognized in *Ryan Stevedoring Company v. Atlantic Steamship Corporation,* 350 U.S. 124 (1956), where a shipowner was allowed to recover indemnity against a stevedore for its failure to safely perform its services, thereby rendering the ship unseaworthy. The shipowner's right to indemnity under *Ryan,* however, is limited to those situations where, as here, the shipowner's conduct does not preclude liability, i.e., conduct on the part of the shipowner which prevents the stevedore from performing his services in a workmanlike manner. *See Weyerhauser Steamship Co. v. Nacirema Operating Co.,* 355 U.S. 363 (1958); *Smith & Kelly Co. v. The S/S Concordia TADJ.* 718 F.2d 1022 (11th Cir. 1983); and *Brock v. Coral Drilling, Inc.,* 477 F.2d 211 (5th Cir. 1973). This right under *Ryan* is not limited by the 1972 amendments to the Longshoreman and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§901-990 (1982), as amended, because the injured employees are expressly excluded from LHWCA's coverage as employees of a municipality.[2] *See* 33 U.S.C. §903.

The evidence clearly establishes that the negligence of Wilmington Stevedores caused the vessel to become unseaworthy resulting in the fatal injuries. Also, the evidence establishes that the vessel owner in no way interfered with the stevedore's performance of its services. Thus, under *Ryan* and *Weyerhauser,* the vessel, its owner and its charterer are entitled to indemnity from

---

2. 33 U.S.C. §903 provides in pertinent part:

Compensation shall be payable in respect of disability or death of an employee . . . No compensation shall be payable in respect of the disability or death of . . .

. . .

(2) Any officer or employee . . . of any state or foreign government, or any political subdivision thereof.

Wilmington Stevedores for its breach of the implied warranty of workmanlike services.

The vessel owner and charterer's claim against the City raises a more difficult problem. First, it is important to note that any indemnity recovered against the City for the injuries to its employees must be based on some theory other than tortious conduct. The Delaware courts have interpreted 19 DEL CODE ANN. §2304 as providing the exclusive remedy of an employee against an employer arising out of tortious conduct. *See e.g., Miller v. Ellis*, 122 A.2d 314 (Del. 1956). More importantly, the Delaware Supreme Court in *Diamond State Telephone Co. v. University of Delaware*, 269 A.2d 52 (Del. 1970) has held that the only basis for liability for indemnity from an employer governed by §2304, "is the breach of a promise, either express or implied" to perform in a workmanlike manner. *Diamond State, supra. See also Rock v. Delaware Electric Cooperative, Inc.*, 328 A.2d 449 (Del. Super. 1974). Similarly, indemnity for damages paid to an employee covered by the LWHCA is limited under *Ryan* and its progeny to contractual breach, and not tortious conduct.

In this case, the record does not disclose any evidence to support a finding of breach of an implied or express promise as between the City and the vessel owner, or its charterer. There are no facts which evidence any direct contractual relationship between the vessel owner and the City. The vessel owner argues, however, that an implied promise to perform in a workmanlike manner was made and breached by the City. The only way to support such a conclusion would be to find that the vessel owner was an intended beneficiary of the contract between the City and the stevedore, and that the City, by supplying the crane without a functioning load indicating device, breached a duty of workmanlike service owed to the stevedore. Assuming that the vessel owner was in fact a beneficiary of the contract between the City and Wilmington Stevedores, there is no evidence to support

a breach of that contract by the City. The crane supplied by the City was not defective as to its ability to safely lift a maximum of twelve coils per load. Moreover, the City expressly limited any warranty of the performance of the crane to a twelve coil limit. This express limitation on the crane's load capacity negates any assertion by the stevedore that the crane was impliedly warranted for lifts of more than twelve coils. Therefore, the City was not in breach of any warranties, express or implied, which the vessel owner or its charterer could successfully rely on for his claim of indemnity.

Likewise, the stevedore's claims for indemnity must also fail. Wilmington Stevedore seeks indemnity based on theories of negligence, strict liability and implied warranty. The stevedore's claim based on either negligence or strict liability must fail in light of the discussion of 19 DEL. CODE ANN. §2304 and *Diamond State* recited earlier.[3] Its claim premised on implied warranty must also fail, in that the existence of an express limitation on the loan capacity of the crane negates any assertion of an implied warranty which would exceed the express limitation. Thus, the City is not liable to the stevedore for indemnity on any basis.

## CONCLUSIONS OF LAW

1. The claims presented are maritime in character and within the admiralty jurisdiction of the court. 28 U.S.C. §1333(1) (1982).

2. Plaintiffs are entitled to recover against the vessel and its charterer because the unseaworthiness of the

3. The stevedore has also asserted a claim against the city based on comparative fault. While it is true that this doctrine has been adopted for use in admiralty and maritime cases, the exclusivity provision of the Delaware compensation law precludes any recovery by the stevedore here. In that the City as an employer cannot be liable as a joint tortfeasor with Wilmington Stevedores, any claim for contribution premised on comparative fault must fail.

vessel was a substantial factor in causing the fatal accident.

3. The unseaworthiness of the vessel was in no way contributed to by the vessel owner or its charterer and, accordingly, said vessel owner and charterer are entitled to indemnity against Wilmington Stevedores, Inc.

4. Plaintiffs are entitled to recover from Wilmington Stevedores, Inc. because its negligence was a substantial factor in causing the accident.

5. Wilmington Stevedores, Inc. is not entitled to indemnity from the City of Wilmington for damages which plaintiffs may recover in this suit, because there was no express or implied warranty by the City that the crane was fit for the purpose of lifting a draft in excess of 12 coils.

6. Wilmington Stevedores, Inc. is not entitled to contribution from the City of Wilmington on theories of negligence or strict liability for damages which the plaintiffs may recover on their cause of action because of the negligence of the stevedore.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| | |
|---|---|
| ODESSA PURNELL, as the Administratrix of the Estate of LARRY McKINLEY WISE, Deceased | CIVIL ACTION |
| *vs.* | |
| NORNED SHIPPING, B.V. | |
| *vs.* | |
| WILMINGTON STEVEDORES, INC. and CITY OF WILMINGTON | NO. 82-5298 |

**ORDER**

AND NOW, this 25th day of April, 1985, IT IS ORDERED that trial of the damage issues is SCHEDULED for May 20, 1985, at 10:00 a.m. in Courtroom 15B. At the conclusion of the trial, an appropriate order, consistent with the attached memorandum will be filed.

By the Court:

CLIFFORD SCOTT GREEN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

ODESSA PURNELL, as the Administratrix of the Estate of LARRY McKINLEY WISE, Deceased — CIVIL ACTION

*vs.*

NORNED SHIPPING, B.V.

*vs.*

WILMINGTON STEVEDORES, INC. and CITY OF WILMINGTON — NO. 82-5298

**MEMORANDUM**

GREEN, J. — JUNE 19th, 1985

Pending before the court is Wilmington Stevedores' request that I reconsider the adjudication of April 25, 1985 wherein I found that the stevedore was not entitled to indemnity or contribution from third-party defendant City of Wilmington. For the reasons set forth below, Wilmington Stevedores' motion will be denied.

The stevedore's first contention is that the court erred in finding that it was not entitled to contribution from the City of Wilmington based on the negligence and/or strict liability of the City. The stevedore argues that federal maritime law and not state law governs the claim for contribution by joint tortfeasors and thus contribution is not barred by the exclusivity of remedy provision of the Delaware State Workmen's Compensation Law. The prior adjudication concluded, as Wilmington Stevedores argues, that federal maritime law governs this case.[1] However, federal maritime law does not re-

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1. This is so despite a colorable argument that only plaintiffs'

quire that Wilmington Stevedores receive from the City contribution under these facts.

Federal maritime law provides for contribution among joint tortfeasors guilty of concurrent negligence. Contribution is available in maritime matters only if the injured party is not barred from suing the person from whom contribution is sought. *Cooper Stevedoring Company, Inc. v. Fritz Kopke Inc.*, 417 U.S. 106 (1974).

It is undisputed that plaintiffs in these cases are barred by the Delaware State Compensation law from suing their employer, the City of Wilmington. It is the position of the stevedore that the prohibition against contribution should only be enforced in favor of employers subject to the Longshoreman's and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 901-933 (1982). Government entities are excluded employers under the LHWCA; however, where the governmental unit is required by state law to provide a compensation remedy to its employees, which is similar in scope to the compensation remedy of the LHWCA, no good reason appears to preclude the governmental unit from relying on the exclusivity provision of the state compensation statute.[2]

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NOTES *(Continued)*

claims for unseaworthiness are governed by federal maritime law. In determining whether an action falls within the admiralty jurisdiction of the federal court, courts have traditionally looked to see where the wrong occurred. In the context of this litigation, the City's negligent conduct was in relying on the stevedore to follow instructions instead of equipping the crane with a functioning load limiting device and is, therefore, land-based. However, the accident complained of took place on navigable waters. Thus, federal admiralty jurisdiction is appropriate.

2. The stevedore requests that I assign a percentage of fault between itself and the City even if I conclude that there is no basis for contribution. Considering the fact that the negligence of the City was limited to its failing to protect plaintiffs from negligence of the stevedore in violating the express restrictions on the C-2 crane, my apportionment of damages would assign only the most nominal percentage of fault to the City of 1%.

The other contentions raised by the motion for reconsideration have all been carefully considered and are rejected.[3] Thus, for the reasons set forth herein as well as the reasons set forth in the April 25, 1985 adjudication, defendant's motion for reconsideration will be denied.

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3. In the adjudication heretofore filed, I discussed the evidence produced but did not make specific reference to the opinions expressed by the experts called by the parties; however, I considered and weighed all of the opinions expressed in reaching my conclusions on liability.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 85-1507, 85-1508,
85-1509, and 85-1510

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PURNELL, ODESSA,
As the Administratrix of the Estate of
WISE, LARRY MCKINLEY, Deceased

*vs.*

NORNED SHIPPING B.V. and
CHESAPEAKE TRADING CORPORATION

*vs.*

WILMINGTON STEVEDORES
and
CITY OF WILMINGTON
(Third Party Defendants)
Wilmington Stevedores, Inc.,
*Appellant in No. 85-1507*

---

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil Action Nos. 82-5298, 83-1118,
83-0605, and 83-3084)

Present: SLOVITER and STAPLETON, *Circuit Judges*
and MENCER, *District Judge**

---

*Honorable Glenn E. Mencer, United States District Judge for the Western District of Pennsylvania, sitting by designation.

**JUDGMENT**

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel May 1, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered June 20, 1985 in D.C. Civil Nos. 82-5298, 83-0605, 83-1118 and 83-3084, be and the same are hereby affirmed insofar as the indemnity and apportionment of fault issues and reversed insofar as the contribution issue. It is further ordered that the causes be remanded to the said District Court for further proceedings consistent with the opinion of this Court.

Attest:

_____

*Clerk*

September 17, 1986

Certified as a true copy and issued in lieu of a formal mandate on November 10, 1986

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1507, 85-1508,
85-1509, and 85-1510

PURNELL, ODESSA,
As the Administratrix of the Estate of
WISE, LARRY MCKINLEY, Deceased

*vs.*

NORNED SHIPPING B.V. and
CHESAPEAKE TRADING CORPORATION

*vs.*

WILMINGTON STEVEDORES
and
CITY OF WILMINGTON
(Third Party Defendants)
Wilmington Stevedores, Inc.,
*Appellant in No. 85-1507*

**SUR PETITION FOR REHEARING**

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellee City of Wilmington in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Weis would grant rehearing.

By the Court,

_____
*Circuit Judge*

Dated: October 31, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 85-1507, 85-1508,
85-1509, and 85-1510

---

PURNELL, ODESSA,
As the Administratrix of the Estate of
WISE, LARRY MCKINLEY, Deceased

*vs.*

NORNED SHIPPING B.V. and
CHESAPEAKE TRADING CORPORATION

*vs.*

WILMINGTON STEVEDORES
and
CITY OF WILMINGTON
(Third Party Defendants)

Wilmington Stevedores, Inc.,
*Appellant in No. 85-1507*

---

BEFORE: SLOVITER and STAPLETON, *Circuit Judges*
and MENCER, *District Judge**

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**ORDER**

IT IS ORDERED that the City of Wilmington's petition for panel rehearing be and hereby is denied.

By the Court:

_____
*Circuit Judge*

Dated: October 31, 1986

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*Honorable Glenn E. Mencer, United States District Judge for the Western District of Pennsylvania, sitting by designation.

## TEXT OF STATUTES INVOLVED

33 U.S.C. §903 **Coverage**

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, or building a vessel). No compensation shall be payable in respect of the disability or death of —

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

33 U.S.C. §905 **Exclusiveness of liability**

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kind, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

*Delaware Code*, Title 19, §2304 **Compensation as exclusive remedy.**

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

*Delaware Code*, Title 19, §2310 **Applicability to persons engaged in interstate or foreign commerce.**

This chapter shall not apply to employees injured or killed while engaged in interstate or foreign commerce or to their employers whenever the laws of the United States provide for compensation or for liability for such injury or death.

Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1276

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF WILMINGTON,
*Petitioner*

*v.*

WILMINGTON STEVEDORES, INC.,
*Respondent*

## BRIEF FOR RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should this Court review the decision of the United States Court of Appeals for the Third Circuit involving a fact-based application of Delaware statutory law where the decision does not conflict with any federal law or any decision of another federal court of appeals?

2. Should this Court review the decision of the United States District Court for the Eastern District of Pennsylvania on an issue when that issue was neither raised on appeal to the United States Court of Appeals for the Third Circuit, resolved by the Court of Appeals nor fully addressed by the parties?

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No. 86-1276

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF WILMINGTON,
*Petitioner*

*v.*

WILMINGTON STEVEDORES, INC.,
*Respondent*

## BRIEF FOR RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

The respondent, Wilmington Stevedores, Inc., respectfully prays that a writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Third Circuit rendered in this proceeding on September 17, 1986 for the reasons set forth below.

### REASONS FOR DENYING THE WRIT

### I. THE CONTRIBUTION RULING

Contrary to petitioner's contention, the decision of the United States Court of Appeals for the Third Circuit regarding the issue of contribution presented in this case is not predicated upon resolution of a federal question

and does not conflict with any decision of a federal court of appeals. In fact, the Third Circuit opinion specifically distinguishes this case and demonstrates that no such conflict exists.

The heart of the Third Circuit opinion is that Wilmington Stevedores, Inc. ("Stevedore") had a claim for contribution against the City of Wilmington ("City") because the specific language contained in the Delaware Workman's Compensation Act allowed for it. 19 Del. C. §2301 *et seq.* More particularly, the Third Circuit found that the Delaware Workmen's Compensation Act "expressly stipulates that its provisions do not apply to maritime workers who were 'injured or killed while engaged in interstate or foreign commerce, or to their employers, whenever the laws of the United States provide for compensation or for liability for such injury or death.' " (Pet. for Cert. A-11). The Third Circuit recognized that the federal maritime common law, under the principles of *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), did impose "liability for such injury or death", and, accordingly that "Delaware's statute, by its own terms, is not applicable in the circumstances currently before this court". (Pet. for Cert. A-11).

Furthermore, in response to the City's petition for panel rehearing on the issue, the Third Circuit specifically held that its earlier opinion "holds only that Delaware, by virtue of 19 Del. C. §2310, has elected not to confer its workmen's compensation benefits on workers 'injured or killed while engaged in interstate or foreign commerce . . . whenever the laws of the United States provide for compensation or for liability for such injury or death.' " (Pet. for Cert. A17-A18) (emphasis omitted). Clearly, the Third Circuit has unequivocally held that its decision rests upon the specific language and application of the Delaware statute to the particular facts of this case.

The cases which petitioner cites to support its contention that there is a split among the circuits on this

particular issue are inapposite in that, unlike the Delaware statute, the language of the workman's compensation statutes involved in those cases conflicted with the federal maritime law. For example, in its opinion sur denial of the City's petition for panel rehearing, the Third Circuit itself distinguished its decision in *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978), noting that, unlike the Delaware statute, the "exclusivity provision of the Pennsylvania statute was applicable on its face." (Pet. for Cert. A-17). The decisions rendered in *Arvidson v. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972), *cert. denied*, 409 U.S. 983 (1972), *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976) and *Thibodaux v. Atlantic Richfield Co.*, 580 F. 2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979) are similarly and equally distinguishable.

Thus, in conclusion, there is neither a federal question, a conflict in the circuits, nor any significant reason or particular national policy which requires this Court to review the judgment rendered by the Third Circuit in this action.

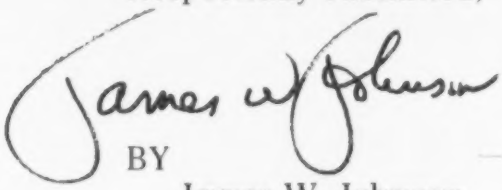
## II. THE INDEMNIFICATION RULING

The City now, for the first time after the decision of the District Court, questions the District Court's indemnification ruling. This issue was neither raised on appeal to the Third Circuit, nor resolved by it and certainly was not fully addressed by the parties. The general rule is that this Court "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). While the foregoing rule is not "inflexible", exceptional circumstances are required in order for this Court to take that exception. *Id.* The petitioner has completely failed to justify such an exception. Therefore, this issue should not be the subject of review by this Court.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1276

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF WILMINGTON,

*Petitioner*

*v.*

WILMINGTON STEVEDORES, INC.,

*Respondent*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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*Thibodaux v. Atlantic Richfield Company*, 580 F.2d 841 (5th Cir. 1978), *cert. den.* 422 U.S. 909 (1979) ..... 2

The petitioner, the City of Wilmington, Delaware, wishes to further support its petition for a writ of certiorari by filing this reply brief to address the arguments raised in the brief of the respondent.

## I. THE CONTRIBUTION RULING.

In opposing certiorari, respondent Wilmington Stevedores seeks to minimize and localize the significance of the conclusions reached below. In the process, respondent tells this Court that language in the Delaware workers' compensation statute was at "the heart" of the Third Circuit opinions, and that the state statutory language dictated the result below. That is incorrect.

The central conclusion of the Third Circuit was that the maritime wrongful death cause of action, announced in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), was preemptive of any exclusivity provision in a state workers' compensation statute. The Third Circuit declared itself convinced that there was no theory or rationale "by which we could conclude that a state statute can extinguish a federally created cause of action." (Opinion sur denial, A-17.)

Having given preemptive and overriding effect to the cause of action it found in *Moragne*, the Third Circuit then could observe that Delaware law was consistent, in the sense of recognizing a preemptive sphere for liability under federal "laws". However, there is nothing in the central holding to suggest that the Third Circuit would have concluded otherwise even if the Delaware statute had been worded differently. In the view of the Third Circuit, regardless of the wording of a state's compensation statute, it must yield to *Moragne*, even in precisely the same situation where the federal maritime compensation statute would not. Cf., *Moragne*, 398 U.S. at 394, fn. 11.

As demonstrated in the City's petition, there is a fundamental and uncontrovertible split between four Circuits.[1] Two Circuits reason by practical analogy, while now two employ a literal approach and come to a contrary conclusion. One can only attempt to justify the split and harmonize the decisions by, in turn, misapprehending the significance of a *Moragne* wrongful death cause of action.

It was facile for respondent Stevedores to have brushed off that split on the basis that the respective decisions "are similarly and equally distinguishable". (Resp. brf.-3.) The varying results among the Circuits are not explainable by differences in wording of state compensation statutes. In fact, the wording of the coverage provisions in the respective state statutes did not come into play in any of those decisions. The local law neither framed the issue below, nor framed the issue in those other decisions. Hence, unless resolved here, there remains a broad split on an issue of national importance in maritime law.

## II. THE INDEMNIFICATION RULING

Respondent Stevedores treats the second issue even more casually and briefly. It simply says to this Court that the City's petition constitutes the first questioning of the District Court's indemnification ruling, and that the issue was neither raised nor resolved on appeal. That is deceptive and basically incorrect.

As the prevailing party in the trial court, of course the City had not been the appellant and, hence, was not in a position to dictate the appeal issues. However, once the matter was before the Third Circuit, the City raised

1. *Thibodaux v. Atlantic Richfield Company*, 580 F.2d 841 (5th Cir. 1978), *cert. den.* 422 U.S. 909 (1979); *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976); *Arvidson v. Dillingham Corporation*, 462 F.2d 1 (9th Cir. 1972), *cert. den.* 409 U.S. 983 (1972) and *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978).

the indemnification ruling, critically, in an attempt to utilize the issue as an alternative ground for affirmance.[2] The City gave two pages of discussion to the indemnification issue in its brief to the Court of Appeals. That discussion plainly noted the split between Fifth and Ninth Circuit precedent, and reminded the Third Circuit of its own, earlier expressed criticism of *Sieracki-Ryan*.

The Third Circuit did not take up the City's invitation to discuss the issue. However, neither did the Third Circuit sidestep the issue entirely, as it might have done by affirming on the facts but expressly reserving on the legal issue. Instead of reserving on the legal issue, it stated its conclusion, which was that *Sieracki-Ryan* would remain in good law for maritime employees not covered by the LHWCA.[3] By so doing, it thereby heightened the conflict between the maritime Circuits.

The City of course must concede that the indemnification issue, as a matter of law, was not a central point nor thoroughly treated by the Court of Appeals. However, there surely is enough here, in terms of the record developed and the significance of the issue, to decline application of the ordinary rule against considering questions not specifically passed upon by the lower court. For one, again, there is a reasonable basis to say that the Court of Appeals did specifically pass upon the issue. Further, the issue certainly was treated in the District Court, so there is a record on it. Further, it is an issue of law, with no factual issues necessary for its resolution. Hence, briefing, argument and consideration here will not be circumscribed or constrained simply because the Third Circuit has not fully explicated its views. Cf., *Capital Cities Cable, Inc. v. Crisp*, 461 U.S. 691, 697-98 (1984); *New York City Transit Authority v. Beazer*, 440 U.S. 581, 583 (1979), at fn. 24.

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2. This was in keeping with Third Circuit practice. *Rhoads v. Ford Motor Company*, 514 F.2d 931, 934 (3d Cir. 1975).

3. Slip op. at 6, fn. 1 (A-6).

The Court has oft-reiterated that its usual rule on scope of review is not inflexible. Indeed, in appropriate cases arising from federal courts this Court has directed consideration of additional issues which had not even been raised nor treated by the parties below. In the context of this case, it seems particularly appropriate to note that in fact the central issue in *Moragne* was first raised by this Court upon its own "fresh consideration of the entire subject." *Moragne*, 398 U.S. at 378.

Here the reach would not be as great. The issue presented is in the record and has been part of the case since the earliest pleadings. The issue of whether *Sieracki-Ryan* remain good law, despite obvious Congressional intent to the contrary, is an issue which, in the last analysis, only this Court can, and should resolve.

## CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals. Nothing presented in the respondent's opposition calls into question the appropriateness of further review.

Respectfully submitted,

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